1974 WL 215
86 L.R.R.M. (BNA) 3075, 8 Empl. Prac. Dec. P 9585, 74 Lab.Cas. P 33,100
(Cite as: 1974 WL 215 (S.D.Tex.))

United States District Court; S.D. Texas, Houston Division.

Clayton Daugherty et al., Plaintiffs
v.
United States of America, Peter J. Brennan, Secretary of Labor et al., Defendants
v.
Associated Independent Electrical Contractors of America, Inc. et al., Intervenors.

Civil Action No. 70-H-1096

July 22, 1974

SEAL, D.J.

Memorandum Opinion and Order
[Background Facts]

*1 Plaintiffs, certain labor organizations, and apprentices enrolled in those organizations' sheet metal apprenticeship program, brought this suit to challenge the proposed approval by the Secretary of Labor of an apprenticeship training program under the National Apprenticeship Act, 28 U.S.C. § 50, for sheet metal workers sponsored by the Defendant, Associated Builders and Contractors, Inc. The case was set for trial before the Court, and at the conclusion of Plaintiffs' case the Defendants moved for judgment. The Court ordered briefs to be filed and the case is presently before the Court on Defendants' Motion for Judgment.

The National Apprenticeship Act which was passed in 1937 provides in pertinent part:

". . . That the Secretary of Labor is hereby authorized and directed to formulate and promote the furtherance of labor standards necessary to safeguard the welfare of apprentices, to extend the application of such standards by encouraging the inclusion thereof in contracts of apprenticeship, to bring together employers and labor for the formulation of programs of apprenticeship, to cooperate with state agencies engaged in the formulation and promotion of standards of apprenticeship, . . .

"Sec. 2. The Secretary of Labor may publish information relating to existing and proposed labor standards of apprenticeship, and may appoint national advisory committees to serve without compensation. Such committees shall include representatives of employers."

In order to carry out the duties delegated to the Secretary of Labor by this Act the Bureau of Apprenticeship and Training (BAT) was established. At first BAT was a separate bureau within the department, but then in 1963 it was assigned by order of the Secretary of Labor to the Manpower Administration. The purpose of BAT, as evidenced by the testimony at the hearing of Hugh C. Murphy, Administrator of BAT, is to aid labor and industry in developing, expanding and improving apprenticeship programs in skilled trades such as electrical, plumbing, and sheet metal work. The program is an attempt to provide some degree of uniformity in skills necessary for a particular industry and to rekindle a sense of pride of craftsmanship in skilled trades. Local apprenticeship programs established in accordance with policies established by BAT under the Apprenticeship Act are registered by BAT and apprentices finishing such programs receive a certificate showing that they have satisfactorily completed a registered program. Some states have passed legislation providing for the establishment and operation of state apprenticeship agencies. Where this is the case, BAT aids the state agency by providing staff training and assistance in devising a statewide plan of effective operation. Where a state agency exists registration of apprenticeship programs and apprentices is with that agency. In states such as Texas that have no state apprenticeship laws and programs then apprentices and programs are registered directly by BAT.

*2 There is no law requiring an apprenticeship program be registered in order to operate nor is there any law requiring an individual to complete a registered apprenticeship program before he can work at a particular skill or craft. Furthermore, there is no law which requires the Secretary of Labor to register apprenticeship programs. The only legal effect of the registration of these programs that has been shown to this Court is in relation to government contracts subject to the Davis-Bacon Act, 40 U.S.C. § 276a-2 and 29 C.F.R. § 5.5(a)(4) which requires that the

contractor may hire apprentices and pay them as such "only when they are registered, individually under a bonafide apprenticeship program . . . registered with the Bureau of Apprenticeship and Training, United Stated Department of Labor . . ." Otherwise, the workmen must be hired as, and paid the higher wage rates of journeymen.

Pursuant to the responsibility delegated to it by the Secretary of Labor to publish information relating to existing and proposed labor standards of apprenticeship, BAT from time to time has issued circulars stating basic guidelines used by them in determining if a program should be registered. In 1963 and in 1966 BAT issued Circulars 63-81 and 66-67, both of which provided in part that when BAT registered a new apprenticeship program in an area where one already existed that the standards of the existing local program should be recognized as the basic standards within the geographical area covered by that program, and that the new program should meet those area standards.

[Presidential Statement]

On March 17, 1970 the President of the United States issued a statement on combating construction inflation and meeting future construction needs [FN1] in which he directed that the Department of Labor undertake a comprehensive study of apprenticeship programs in construction crafts to ascertain to what extent and in what ways apprenticeship training programs could be improved and expanded.

FN1 Plaintiffs' Exhibit No. 4 [not reproduced].

The evidence indicates that in response to this directive, and having determined that there was a need for increased flexibility in the apprenticeship program and to provide additional training where existing programs weren't meeting the need for expansion of skilled craftsmen in the entire construction industry, BAT issued in Circular 70-26 new guidelines for apprenticeship programs. The basic change in policy evidenced by this circular is that in order to be registered by BAT a program must meet national apprenticeship standards rather than local area standards. The effect of this is to make it possible for programs which meet national standards to be registered in an area where a program already exists even though it might differ from the local program in terms of such things as wages and therefore would have been denied registration under the local standards policy in existence prior to Circular 70-26. These national standards are set out by two groups: the Sheet Metal Workers International Association, AFLCIO in conjunction with the Sheet Metal and Air Conditioning Contractors' National Association and the Associated Builders and Contractors, Inc.

[Circular 70-26]

*3 It is Circular 70-26 on which Plaintiffs' objections which form the basis of this lawsuit focus. The Plaintiffs are seeking an order from this Court to prohibit Defendants from registering any new apprenticeship program where there is already in existence an active area-wide registered program in the same trade, or in the alternative, to prohibit Defendants from registering any apprenticeship program which has lower standards and wage rates than those already in existence. In short, Plaintiffs seek to prohibit registration of programs incorporating the guidelines of Circular 70-26. The Plaintiffs allege jurisdiction of this Court under the Administrative Procedure Act, 5 U.S.C. §§ 701-706 in that they have suffered a legal wrong because of agency action and have been aggrieved by agency action.

The Defendants assert that the Administrative Procedure Act precludes judicial review of this case because that act specifically excludes from judicial review agency action which is committed to agency discretion by law. The intervenors, Associated Independent Electrical Contractors of America, Inc. and Johnny Lee Johnson, an apprentice, adopt the position of the Defendant.

As noted before the National Apprenticeship Act among other things directs that the Secretary of Labor is to formulate and promote the furtherance of labor standards necessary to safeguard the welfare of apprentices and to publish information relating to existing and proposed labor standards of apprenticeship, and the Secretary of Labor has delegated this responsibility to the Administrator of BAT.

As observed in the only reported case dealing with the question of registration of apprenticeship programs under the National Apprenticeship Act since its inception in 1937, *Gregory Electric Co. v. United States Department of Labor,* 268 F.Supp.

987 (D.S.C., 1967):

"The National Apprenticeship Act, 29 U.S.C.A. § 50 is written in very broad terms. It contains a wide grant of authority to the Secretary of Labor to develop and promote standards of training for apprentices, and to give such standards the widest possible application. This delegation of such authority recognizes a particular expertise of the Secretary of Labor in such matters."

An express statement that the agency action involved is committed to agency discretion is not required to bring it in the purview of the exception from the Administrative Procedure Act. Where the overall statutory scheme indicates discretion on the part of the administrator, it is committed to the discretion of the officer or agency within the meaning of the statute and thus excepted from judicial review. *Panama Canal Company v. Grace Line, Inc.*, 356 U.S. 309 (1958).

The Court is of the opinion that the broad, loose statutory language of the National Apprenticeship Act compels the conclusion that the Act grants an extremely wide discretion to the Secretary to determine what labor standards shall be "necessary to protect the welfare of apprentices." 28 U.S.C. § 50. From the information which has been provided the Court on apprenticeship programs and the construction industry in general it is clear to the Court that the decision on registering an apprenticeship program requires a substantial amount of judgment and expertise, and may turn on many technical facts. These are matters which Congress has left to the discretion of the Department of Labor and matters in which the Court should not interfere and substitute what would amount to a *de novo* decision on its part.

*4 Even if the actions of the Secretary of Labor with respect to the registration of apprenticeship programs were subject to judicial review, the Court will not set aside agency action unless it is found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706. See Davis, *Administrative Law Treatise*, § 26.16 (1970 Supplement). As has been noted by this Court before, the burden on Plaintiffs to make this showing is a heavy one. *Klanke v. Camp*, 320 F.Supp. 1185 (S.D. Tex., 1970). The Secretary of Labor's action in drafting and publishing Circular 70-26 is clearly from the language of the National Apprenticeship Act permissible as a means of carrying out his responsibilities under the Act to "formulate and promote the furtherance of labor standards . . ., to extend the application of such standards by encouraging the inclusion thereof in contracts of apprenticeship, . . ., and to publish information in relation to existing and proposed labor standards of apprenticeship . . ."

The Court is of the opinion that the Plaintiffs have totally failed to make out a case in point of fact that the actions of the Secretary of Labor, including the proposed action of registering the Defendant, Associated Builders and Contractors' program are in any manner unlawful. The Plaintiff has introduced a great volume of evidence purporting to show the differences between programs registered during the time the local area standards were to be the guideline and those registered subsequent to Circular 70-26 which uses national standards as the guideline and to show that the effect of Circular 70- 26 is to lower the standards and quality of training in the craft. But at most this evidence only shows that there are differences of opinion as to the content of standards; it does not show an abuse of discretion or arbitrary, capricious action by the Department.

Circular 70-26 was issued in the same manner as the previous circulars. As noted in *Gregory*, rules and regulations having "legal effect" and "general applicability" are published in the Federal Register, Federal Register Act, 44 U.S.C. § 305 and 1 CFR § 11.2, and the Administrative Procedure Act, 5 U.S.C. § 1102(a)(D) requires that "substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency" be so published. The fact that this circular and its predecessors have not been published is an indication that this type of circular does not amount to "agency action" legally subject to judicial review. It is also a further indication that these circulars are guidelines and cannot bind the Secretary of Labor or create any legal rights in anyone.

The Plaintiffs have offered no proof that programs which meet national standards will fail to turn out craftsmen skilled in their particular craft. In fact the Court is convinced from the evidence that the change in policy evidenced by Circular 70-26 may

very well have a positive effect on apprentices and apprenticeship programs by bringing to an end the monopoly situation which seems from the evidence to exist now for the existing union-sponsored registered program. An increase in the number of registered programs in a given area will provide more opportunities for people to be apprentices, to learn and practice the skills of the trade which they desire to enter in apprenticeship programs that they can be confident meet certain minimum standards because they have been registered and are continually monitored by BAT. Further, the evidence indicates that the registration of Defendant Associated Builders and Contractors' programs as well as other programs meeting national standards will result in wider minority participation in apprenticeship programs.

*5 In short, for the reasons stated above, this Court is convinced that the Defendants' Motion for Judgment must be granted.

At the time of the trial of this case the Plaintiffs urged that this action be maintained as a class action and filed an Amended Complaint naming Clayton Daugherty as Plaintiff to represent the apprentices participating or who might in the future participate in the registered program of the Houston Area Sheet Metal Workers. Rule 23(a)(4), Fed.R.Civ.P. specifies as a prerequisite to maintaining a suit as a class action that the representative parties will fairly and adequately protect the interests of the class. While Mr. Daugherty is an apprentice, there is no evidence indicating that the interests of Mr. Daugherty coincide with those of other present and future apprentices to enable him to fairly and adequately protect their interests. This conclusion is emphasized by the fact that an apprenticeship intervened adopting the position of the Defendants. Therefore, Plaintiffs' motion to maintain this suit as a class action is denied.

It is hereby Ordered that Defendants, within ten (10) days of the date of filing of this Memorandum Opinion and Order, file a Judgment consistent with the findings herein, and approved as to form by the Plaintiffs.

The Clerk will enter this Memorandum Opinion and Order and provide counsel for all parties with true copies.

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